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No. 97-437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BETTY SPAHN, Sister and Guardian of Edna M. Folz,
Petitioner,

v.

MARK WITTMAN, Guardian ad Litem for Edna M. Folz,
Respondent,

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The Wisconsin Health Care Association, Inc. ("WHCA"), is a trade association comprised of approximately 245 nursing facilities throughout the State of Wisconsin. It is organized as a non-profit corporation under the laws of the State of Wisconsin.

While the role of the nursing facilities has evolved to include increased rehabilitation of residents for return to a non-institutional setting, a significant segment of the resident population still includes those at the end stages of life. The decision below directly impacts most Wisconsin health care providers. Given the nature of their resident population, Wisconsin nursing facilities are frequently presented with end of life issues, and are therefore in a position to inform the court of interests other than those represented by the parties.

WHCA, through counsel, has received consent of all parties to submit a brief in the matter, and respectfully submits this *amicus curiae* in support of the Petition for Writ of Certiorari.

*** Pursuant to Supreme Court Rule 37.6: This brief was exclusively written, produced and funded by the *amicus curiae*. No parties, or their counsel, have authored or contributed monetarily to the preparation or submission of this brief.**

SUMMARY OF THE ARGUMENT

WHCA does not wish to needlessly burden the Court with the repetition of the petitioner's arguments, but generally seeks to add practical arguments to those legal argument previously presented in the Petition for Writ of Certiorari. More importantly, WHCA intends to demonstrate that the decision below is important to others beyond the parties immediate to that decision. Specifically, that the decision is of importance to the countless residents of Wisconsin who have not clearly and specifically provided instructions regarding life-sustaining treatment, as well as the health care providers who are responsible for the care and provision of treatment to the residents of Wisconsin. This decision is important due to the uncertainty that it has created with respect to: its application to withholding as well as withdrawal of treatment; what is to be considered life-sustaining treatment; and what is to be considered a sufficient prior statement of intentions.

ARGUMENT

I. THE DECISION BELOW IMPACTS AND IS OF IMPORTANCE TO OTHERS BEYOND THE IMMEDIATE PARTIES DUE TO THE UNCERTAINTY IT HAS CREATED.

It is self-evident that any decision of the Wisconsin Supreme Court involving the right of individuals to withhold or withdraw life-sustaining medical treatment has the potential for impacting every Wisconsin resident, as all persons must ultimately face end of life issues. The statement of the court below that, if a person is not in a persistent vegetative state,"as a matter of law, it is not in the best interest of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advanced directive or other clear statement indicating his or her desires" *In re Edna M.F. v. Eisenberg.*, 210 Wis.2d 558,568, 563 N.W.2d 485,489-90 (Wis. 1997) potentially impacts every Wisconsin citizen who has not executed an advance directive or has failed to adequately make a clear statement regarding his or her desires with respect to the withholding or withdrawal of life-sustaining treatment.

For the court to state that absent a diagnosis of persistent vegetative state, it can *never* be in the best interest to withdraw life-sustaining treatment in the absence of sufficiently clear prior intentions, directly impacts all residents who would wish to avoid life sustaining treatment in certain circumstances, yet

have failed to properly convey such intentions and desires. The true number of affected individuals cannot be determined because, as the Wisconsin Supreme Court previously so articulately summarized:

> Relatively few individuals provide explicit written or oral instructions concerning their treatment preferences should they become incompetent. The reasons for which are undoubtedly myriad: ignorance, superstition, carelessness, sloth, procrastination or the simple refusal to believe it could happen to oneself. This failure to act is not a decision to accept all treatment, nor should society's increasing ability to prolong the dying process make it one.

In the Matter of Guardianship of L.W., 167 Wis.2d 53,74-75, 482 N.W.2d 60,68 (footnote omitted)(Wis. 1992).

While the decision below is clearly important to individual Wisconsin residents beyond parties involved, the health care providers who are responsible for their care, treatment, and abiding by the health care decisions are also significantly impacted by this decision. WHCA cannot speak on behalf of all Wisconsin health care providers, but it can stress the importance of the decision below as it pertains to nursing facilities within Wisconsin.

Nursing facilities are regularly presented decisions involving life-sustaining medical treatment. The decision below significantly impacts the everyday provision of care for the large number of incompetent residents within their facilities. This is particularly true when read in conjunction with the court's prior decision of *In the Matter of Guardianship of L.W.*, 167 Wis.2d 53, 482 N.W.2d 60 (Wis. 1992) which affirmed a trial court's order that a guardian has the authority to withhold or withdraw life-sustaining medical treatment, including artificial nutrition and hydration, on behalf of a ward who is in a persistent vegetative state, where it has been determined in good faith that doing so would be in the ward's best interests.

While it was anticipated that the decision below would clarify and provide facilities and other providers with guidance as to guardians' and other decisionmakers' authority, it has unfortunately created great confusion and concern. This confusion and uncertainty results as much from what the court held, as what remains unstated.

The foremost concern of the nursing facilities is that the patients in their care not be subjected to unwanted medical treatment, and that the ability of a guardian to consent to or refuse such treatment on their behalf should not depend solely upon whether an incompetent patient is in a persistent vegetative state or not. Coupled with this concern is that providers now face great uncertainty as to respecting a guardian's decision given the differing authority that guardians have, based on the ward's

medical classification. This uncertainty is the result of several components of the decision below.

Unlike the holding of *In re L.W.* that specifically authorized the withdrawal *or withholding* of life-sustaining treatment, the holding in the decision below refers only to the "withdrawal" of treatment. While the decision below indicated that it reaffirmed the holding of *In re L.W.*, neither case explicitly determined whether the court views withholding different from withdrawal. Courts in other jurisdictions have often relied upon a premise that there should be no legal distinction made between the withholding and withdrawal of treatment. *See, e.g., In re Conroy,* 98 N.J. 321,369-370, 486 A.2d 1209,1234 (1985). One is left to only presume that the decision below can be read to indicate that a guardian cannot also withhold life-sustaining treatment in the absence of an advance directive or other clear statement of the ward's desires. Left unstated, however, providers and guardians must wrestle with the uncertainty as to whether the decision below should be equally applied to the withholding of treatment.

A second area of concern resulting from the decision below lies with what Wisconsin guardians and providers are to consider to constitute "life-sustaining treatment." While the decision below involved the withdrawal of a life-sustaining feeding tube, the holding makes the blanket prohibition of the withholding of life-sustaining treatment, *See In re Edna M.F.,* 210 Wis.2d at 573, 486 N.W.2d at 492, leaving undefined as to what

treatments are to be considered life-sustaining. While some guidance can be found within the Wisconsin "living will" statute, which contains a definition of "Life-sustaining procedure,"[1] its utility is unclear given that the decision below did not reference or discuss this definition.

Given the court's blanket prohibition that the withdrawal (and presumably withholding) of life-sustaining treatment cannot be in the best interests in the absence of sufficient prior indication, guardians and health care providers are now faced with the prospect of imposing or continuing any and all treatments that might possibly constitute life-sustaining treatment when an incompetent patient has not provided specific and sufficient evidence of their desires as to such treatment.

As an illustration, cardiopulmonary resuscitation (CPR) may be considered life-sustaining treatment for some individuals, however, survival rates for unwitnessed arrests within nursing homes and overall survival rates for elderly individuals are

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[1] "Life-sustaining procedure" means any medical procedure or intervention that, in the judgment of the attending physician, would serve only to prolong the dying process but not avert death when applied to a qualified patient. "Life-sustaining procedure" includes assistance in respiration, artificial maintenance of blood pressure and heart rate, blood transfusion, kidney dialysis and other similar procedures, but does not include:

(a) The alleviation of pain by administering medication or by performing any medical procedure.

(b) The provision of nutrition or hydration.

Wis. Stats. § 154.01(5).

extremely low[2]. Yet it can be argued that the decision below would prohibit a guardian, in the absence of a prior indication, from consenting to a do-not-resuscitate order. Upon cardiac or pulmonary arrest, the ward may needlessly suffer the traumatic intervention that at best would be futile, at worse could cause suffering with little or no hope of restoring life beyond a comatose or vegetative state. Few would argue that this would be in the best interests of an individual, however, the decision below would appear to prohibit a guardian from weighing the benefits of CPR against the near futility of such treatment.

The above example may be at the extreme of a literal interpretation of the decision below, however, it illustrates the uncertainty faced by providers and guardians. It is difficult to understand why if this hypothetical patient were in a persistent vegetative state, under *In re L.W.*, the guardian would be permitted to apply objective standards in making the determination as to whether such treatment is in the patient's best interests.

Health care providers and guardians, without additional clarification, are at a loss as to which treatments can or cannot

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[2] In a study of 503 consecutive patients aged 70 and over who received CPR, only 3.9% survived to hospital discharge. Only 1 of 116 of patients with unwitnessed arrests survived. Donald Murphy, M.D. et. al., *Outcomes of Cardiopulmonary Resuscitation in the Elderly*, 111 ANNALS INTERNL. MED., 199-205 (1989); *See also*, Sissay Awoke, M.D. et. al., *Outcomes of Skilled Cardiopulmonary Resuscitation in a Long-Term-Care Facility: Futile Therapy?*, 40 J. AM. GERIATR. SOC'Y, 593-595 (1992).

be withheld or withdrawn in the absence of prior explicit indications from the patient. This confusion and uncertainty is the specific reason that WHCA submits this *amicus curiae*. While members may hold differing opinions as to the result of the decision below, there is general agreement that the status quo is untenable.

It is understandable, laudable, and appreciated that the court below chose to error on the side of preservation of life, and part of the difficulty with this decision rests on the fact that the court was presented, and therefore forced to grapple with, the issue of the removal of a feeding tube. While ethicists and courts may attempt to not distinguish between artificial feeding from other life-sustaining treatment *See Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 288-289, 110 S.Ct. 2841, 2857 (1990) (O'Conner, J., concurring); *In re L.W.*, 167 Wis.2d at 70, 482 N.W.2d at 66; *In re Conroy,* 98 N.J. at 373, 486 A.2d at 1236, no matter how objectively one attempts to view such removal as equal to withholding or withdrawal of any treatment, it is nearly impossible to shed the "emotional symbolism" of food. *See Barber v. Superior Court,* 147 Cal.App.3d 1006,1016, 195 Cal.Rptr. 484,490 (Ct.App. 1983).

This notwithstanding, providers and guardians still remain in a situation where they are precluded from analyzing whether treatment is truly appropriate. This may dictate that all treatments that could be considered remotely life-sustaining must be imposed out of uncertainty as to what is truly life-

sustaining and what evidence of a prior statement is sufficient to overcome the presumption that such treatment must be provided to the ward.

Such uncertainty, compounded by the difficulty of determining what is to be considered sufficient indications of a prior clear statement of an individual's desires, has raised provider concerns above and beyond the desire to do what is best for the residents for whom they are entrusted to provide care. With the only guidance provided is that a thirty-year-old statement of "I would rather die of cancer than lose my mind" is insufficient, *See Edna M.F.* 210 Wis.2d at 572, 563 N.W.2d at 491, a determination as to what is sufficient is problematic and raises concerns as to potential civil and criminal exposure.

There are civil concerns associated with continuing or imposing treatment in spite of a guardian's decision to the contrary, due to concern that the purported prior statements are insufficient to overcome the judicial presumption created by the decision below. While providers would not be without solid defense arguments, litigation alleging battery, infliction of emotional distress or similar claims have been brought against providers. *See, e.g., Estate of Leach v. Shapiro,* 13 Ohio App.3d 393, 469 N.E.2d 1047 (Ohio Ct.App. 1984). There are also liability concerns associated with abiding by a guardian's decision to withhold or withdraw treatment. Family members who did not fully agree with the decision of the guardian may attempt to hold providers liable for such actions by asserting that the

provider did so without sufficient evidence of the ward's desires.

In addition, providers have concerns that the uncertainties in this area may expose them to criminal sanctions for abiding by a guardian's decision to withhold or withdraw treatment. While most prosecutions have not ultimately resulted in the imposition of criminal liability *See, e.g., Barber v. Superior Court,* 147 Cal.App.3d 1006, 195 Cal.Rptr. 484 (Ct.App. 1983) the concern cannot be discounted that a zealous or aspiring district attorney will attempt to prosecute a provider who acted on what was believed to be sufficient evidence of a ward's desire.

Civil and criminal actions, while rare, remain a legitimate concern in light of the uncertainties created by the decision below. While liability concerns are generally theoretical in so much as there appears general consensus that so long as proper procedures are followed, most, if not all, liability ceases to exists. However, the uncertainties discussed above as well as uncertainties as to proper procedures for making determinations regarding the sufficiency of an individual statement makes it difficult for providers to dispel their liability concerns. Such uncertainties are compounded by the separate standards that guardians and providers are required to apply to incompetents who are in a persistent vegetative state and those who are not.

II. THE DECISION BELOW CONFLICTS WITH OTHER STATE SUPREME COURTS AND WITH OTHER STATE STATUTES.

As adequately and succinctly detailed in Petitioner's Writ, the Wisconsin Supreme Court's decision in this matter is in conflict with that of several other state supreme court decisions as well as in conflict with several state's statutes in this area [Petitioner for Writ of Certiorari, pp.10-17]. Without repeating such arguments, WHCA would merely contribute a brief and general comment regarding this argument.

One may argue that differing interpretations of the best interest standard and its application is entirely consistent with and envisioned under *Cruzan*, wherein this Court stated that it is constitutionally permissible for the State of Missouri to choose the rule of decision which it did. However, the practical effect of permitting Wisconsin to depart from other states in the interpretation of the "best interests" application, places individuals and health care providers in a difficult position.

Through the long line of caselaw in the area in what can generally be described as the "right to die" decisions, the concept of "best interests" has emerged as a fundamental principle in this area of the law. However, several jurisdictions have interpreted this concept, and the factors that may or may not be considered in its application, with varying standards. A concept that so permeates this area of the law should have some

consistency in application.

Whether an individual must endure treatment that he or she would otherwise refuse if able, should not hinge upon the particular state that the person happens to become incompetent. Many elderly Wisconsin residents maintain separate residences in other states in order to avoid the harsh Wisconsin winters. These individuals and others in our modern mobile society should not be dependent upon which side of a particular state's border-line they happen to fall when they become ill or are involved in a debilitating accident. This Court is in a position to provide guidance and harmonize the differing application of a standard so crucial as that of the "best interests" standard.

CONCLUSION

If all nursing facility patients were competent to make their own medical decisions, or if all Wisconsin residents were to take the time to execute an advance directive detailing their desires with respect to life sustaining treatment, the decision below would be of little significance to Wisconsin nursing facilities. However, a significant portion of Wisconsin nursing home patients are not competent, and the utilization of advance directives among U.S. and Wisconsin population is surprising low.

WHCA is by no means requesting that guardians be granted unfettered discretion to withhold or withdraw treatment, but rather, that they not be judicially precluded from making a reasoned analysis as to the appropriateness of the provision of

medical treatment. That the guardian, in making the best interests determination, be able to apply the objective factors such as those previously enunciated by the court below including:

> The degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.

In re L.W. 167 Wis.2d at 86, 482 N.W.2d at 72 (citing In re Conroy, 98 N.J. 321,363-364, 486 A.2d 1209,1231 (1985)) The holding of the decision below, coupled with the uncertainty as to what is to constitute life sustaining treatment, may require that guardians authorize any and all treatments that may be of remote benefit, without allowing the guardian to weigh the appropriate factors such as those listed above.

For all the forgoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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